ABU SAMAH BACHIK

v.

SARIP SOM & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ABU MANSOR ALI J
[ORIGINATING SUMMONS NO. D5-24-55 OF 1991]
2 OCTOBER 1991

CIVIL PROCEDURE: *Issue - Whether grant of the order on 14 August 1991 had enabled the plaintiff/respondent to steal a march without having the application for several declarations be heard first - Issues in the writ in the 1st application still to be determined - Section 150 Companies Act 1965.*

In the first application, the plaintif/respondent prayed for a number of orders in the matter of s. 150 Companies Act 1965.

In the second application the respondent/plaintiff prayed for declaratory judgments on a number of matters.

The first and second applications were ordered to be heard one after another.

The learned Judge also outlined the following matters. That is upon the Court having granted the plaintiff the prayers in the said encl. 1 on 21 August 1991. The appellant's Counsel applied *vide* encl. 10 for a stay of the orders dated 14 August 1991 pending an appeal to the Supreme Court.

Held:

[1] After hearing Counsel for the defendant and subject to his filing a notice of appeal and in the presence of Counsel for the respondent, the learned Judge allowed a stay as well and ordered that the respondent not to execute their resolution passed on 22 August 1991 pending the appellant's appeal to the Supreme Court.

[2] Properly on 14 August 1991, the plaintiff should have only applied for directions instead of orders in the second application as there are issues in the writ in the first application still to be determined.

[3] Granting of the order on 14 August 1991, it has now been established by the appellant's Counsel with which the learned Judge agreed has enabled the plaintiff/respondent to steal a march without having the 2nd application for several declarations to be heard first.

[Stay of orders granted pending appeal.]

Case referred to:
Lam Kong Co. Ltd. v. Thong Guan Co. (Pte) Ltd. [1985] 2 MLJ 429 ***(cons)***

Legislation referred to:
Companies Act 1965, s. 150

For the plaintif - Mohd Idris bin Hj. Habib; M/s. Mohd Idris & Associates
For the defendant - T. Kuhanandan; M/s. Manaf Kuhan & Ghandi

JUDGMENT

Abu Mansor Ali J:

In D5-24-55-91 (first application) the respondent/plaintiff prayed for the following orders:

(1) Pemohon Abu Samah Bin Bachik (No. K/P:3165561) diberi kebebasan untuk memanggil suatu Mesyuarat Agung Luarbiasa Syarikat dalam masa satu (1) minggu dari tarikh perintah disini untuk tujuan menimbangkan dan meluluskan resolusi-resolusi sepertimana didalam Agenda Mesyuarat yang dilampirkan.

(2) Satu minggu Notis Mesyuarat Agung Luarbiasa tersebut diberikan kepada responden pertama dan kedua atau peguamcaranya.

(3) Suatu arahan bahawa sekiranya responden pertama gagal untuk menghadiri Mesyuarat Agung tersebut, kehadiran pemohon bersendirian pada hari mesyuarat tersebut adalah disifatkan sebagai mencukupi koram dan menjadi Mesyuarat Agung yang sah.

(4) Kos.

And in D1-22-106-91 (2nd application) the respondent/plaintiff prayed for these orders:

(1) Deklarasi bahawa resolusi bertarikh 16 Januari 1991 yang ditandatangani oleh Sarip Som dan Nor Azizah Bt. Tajuddin adalah tidak sah mengikut Memorandom dan Perkara Persatuan.

(2) Deklarasi bahawa perlantikan Puan Nor Azizah Bt. Tajuddin sebagai Pengarah Baru dan En. Shamsuddin sebagai Setiausaha Syarikat yang baru adalah tidak sah mengikut Memorandom dan Perkara Persatuan.

(3) (i) Satu injuksi untuk menyekat defendan pertama, kedua dan ketiga, ejennya, pekerjanya atau sebaliknya daripada melakukan apa-apa percubaan untuk menukar penandatangan yang telah diberi kuasa untuk mengendalikan urusniaga harian dan akaun semasa syarikat No. 307232,105588 dan 206814 di Malayan Banking Bhd. Cawangan Selayang; dan/atau

(ii) apa-apa percubaan untuk mengenepikan Abu Samah Bachik dari Lembaga Pengarah Syarikat dan/atau Pemegang Saham hingga Mesyuarat Agung Tahunan diadakan.

(4) Gantirugi.

(5) Kos.

(6) Lain-lain relif yang dirasakan suaimanfaat oleh Mahkamah mulia ini.

Both 1st and 2nd applications were ordered to be heard one after another. On 14 August 1991 I heard the 2nd application first. There was apparently a letter from the appellant/1st defendant's Counsel asking for a postponement to which I refused as there was a strong objection for the postponement and as there was no merit in the application for the postponement. The case was fixed much earlier and there are other Counsel in the same firm if one could not attend. The Court then proceeded to hear the application.

The applicant's Counsel told the Court that the writ encl. (1) was served on the defendants on 26 February 1991. Up to the date of hearing no defence had been filed. The applicant/respondent therefore applied for judgment in terms of prayers 20(a)(b)(c)(i) and (c)(ii), (d) and (e) in encl. (9).

The Court noted that since encl. (9) includes a prayer for a declaration, the plaintiff/respondent could not pray for a judgment in default without taking a step for judgment in

default (see *Lam Kong Co. Ltd.* v. *Thong Guan Co. (Pte) Ltd.* [1985] 2 MLJ 429 SC). The Court therefore gave no order on encl. (9) and ordered that the case be fixed by the Senior Assistant Registrar for judgment when the applicant/respondent has taken the required step for judgment.

The applicant/respondent then applied that the 2nd application (D5-24-55-91) be heard.

The applicant's /respondent's Counsel complained that the appellant is not present for this hearing and now sends a letter. Applicant prays for orders in prayers 1, 2, 3 and 4 in encl. (1) which was made by virtue of s. 150 of the Companies Act. His application is supported by applicant's affidavit in encl. (2).

In support of his application the applicant deposed that he is the majority shareholder of plaintiff's shares, holding something like 95% of plaintif's shares totalling 100,002 shares. The defendant on the other hand was holding only 502 shares of the plaintiff's company. It is the contention of the plaintiff's solicitors that the 1st defendant was refusing to attend meeting and hence no Annual General Meeting could be convened.

While this argument was in progress the appellant's Counsel Miss Shirley Khoo arrived at 9.40 a.m. to represent the appellant. She applied for a postponement on the ground that Mr. Anthony Fernandez had to leave for London to visit an ailing sister. I refused the postponement as this matter was last handled by Mr. Kuhan and he was told in no uncertain terms that the Court would proceed with this matter as then the plaintiff's Counsel had already complained that he was receiving no response from the defendant's solicitors. I explained to Miss Khoo the stage reached so far.

The plaintiff's Counsel then resumed his submission. He therefore asked for orders in encl. (1)

Miss Shirley Khoo when invited to reply did not have anything to say in reply.

The Court then granted the plaintiff the prayers in 1, 2, 3, and 4 in encl. (1).

On 21 August 1991 the appellant's Counsel Mr. T. Kuhan applied *vide* encl. (10) for a stay of my orders dated 14 August 1991 pending an appeal to the Supreme Court.

After hearing Mr. Kuhan and subject to his filing a notice of appeal and in the presence of Encik Idris for the respondent I allowed a stay of my orders dated 14 August 1991 well as ordered that the respondent not to execute their resolution passed on 22 August 1991 pending the appellant's appeal to the Supreme Court.

I ordered stay in the face of the following facts:

(a) On 22 August 1991 the plaintiff/respondent held an Extraordinary General Meeting at which meeting the defendant/appellant was excluded and some others also appointed to be new signatories of bank cheques in their place.

(b) In the 2nd application (22-106-91):

(i) the plaintiff/respondent was praying for a number of declaration amongst others that the resolution of 16 January 1991 signed by the defendant and others and certain appointments of directors was invalid, null and void.

(ii) the resolution removing plaintif as a director on 23 November 1990 is null and void.

(c) Subsequently before the 2nd application had been disposed of the plaintiff/appellant filed 1st application (O.S. 24-55-91) which was ordered to be consolidated on 24 July 1991.

(d) The Court's order dated 14 August 1991 in the 2nd application included allowing plaintiff to hold an EGM which the plaintif held on 22 August 1991.

(e) Properly on 14 August 1991 the plaintif should have only applied for directions instead of orders in the 2nd application as there are issues in the writ in the 1st application still to be determined namely:

(i) whether the acquisition by the plaintif of his majority shares has been fraudulent as claimed by the defendant.

(ii) the nature of the defendant's guarantee for facilities granted to the company is defendant liable on that guarantee?

(f) Granting of the order on 14 August 1991 it has now been established by the appellant's Counsel, with which I agree has enabled the plaintiff/respondent to steal a march without having the 2nd application (D1-22-106-91) - application for several declarations be heard first.

Also found at [1992] 2 CLJ 987